No. 80643-8

SANDERS, J. (dissenting) —Trial courts are authorized by statute to empanel new juries to determine on remand whether aggravating factors are present in a conviction for murder in the first degree. RCW 10.95.050(4). But this trial court misapplied this court's instructions by having the jury consider only one of the two issues remanded by this court in *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004) (*Thomas* I). There this court held the "jury instruction and the aggravating factors special verdict form given in his case did not require the jury to find that [Covell Paul] Thomas in particular had the intent to murder [the victim] or that the aggravating factors specifically applied to him as opposed to his accomplice. . . . These facts must be found by the jury." *Id*. at 876.

The majority in *Thomas* I remanded to either sentence Thomas on the underlying conviction or for a new trial on the aggravating circumstances. *Id*. However, contrary to that holding, at the new trial the jury instructions did not permit jurors to find all of the requisite facts for which this court remanded, thus repeating the original error.

Furthermore, it is not "race-neutral" to strike the sole African-American from a jury pool simply because that juror expressed concerns about minority

underrepresentation in that very pool. The majority is wrong to accept the trial court's reasoning that a juror who expresses concern about the racial makeup of the venire is "clearly hostile toward the state." 7 Verbatim Report of Proceedings (7RP) at 120-21. I dissent because the trial court improperly instructed the jury at the new trial and because the trial court erred in accepting without inquiry the State's rationale for striking the sole African-American juror in the venire.

I. RCW 10.95.050(4) confers authority to a trial court to empanel a new jury on remand solely to hear evidence on the presence of aggravating factors

Sentencing for aggravated murder in the first degree is governed by chapter 10.95 RCW. Thomas argues there is no mechanism in chapter 10.95 RCW that empowers the trial court to empanel a new jury solely to hear evidence on the presence of aggravating factors, after a different jury has already reached a verdict on the underlying crime. The majority seems to accept this interpretation of chapter 10.95 RCW; it instead locates the trial court's power to empanel a jury in Washington State Superior Court Criminal Rules 6.1 and 6.16. I disagree with this construction of the statute.

RCW 10.95.050(4) provides in pertinent part:

> If the defendant's guilt was determined by plea of guilty or by decision of the trial court sitting without a jury, or *if a retrial of the special sentencing proceeding is necessary for any reason including* but not limited to a mistrial in a previous special sentencing proceeding or *as a consequence of a remand from an appellate court, the trial court shall impanel a jury of twelve persons* plus whatever alternate jurors

the trial court deems necessary.

(Emphasis added.)

The statute contemplates a situation like the one here in which a defendant is convicted of first degree premeditated murder and the jury finds aggravating factors, but then as a consequence of an appellate decision, the case is remanded for a new trial of the special sentencing proceeding on the presence of aggravating factors. In such a case, by the plain language of the statute, the trial court then has the power to empanel a new jury on aggravating factors alone.

This court affirmed Thomas' conviction for murder in the first degree; the question of whether aggravating circumstances were present was remanded to the trial court. This scenario puts Thomas' case squarely within the terms of RCW 10.95.050, and the trial court properly empaneled a new jury to hear the issue. Consequently, I agree with the majority that the trial court had the power to empanel a jury solely for the purpose of determining the presence or absence of factors aggravating Thomas' conviction for murder in the first degree. But I find it unnecessary to determine, as does the majority, whether a trial court would have this power to empanel juries under other statutes or court rules, given the explicit grant of authority contained in RCW 10.95.050(4). *See* majority at 11-12.

II. The trial court's jury instructions on remand did not cure the error this court identified in Thomas I*, so another remand is in order*

Thomas argues the jury instructions on remand allowed him to be "sentenced

to life without parole without [the] jury ever having found that he personally committed the *actus reus* of the crime or intended the death of the victim or that the aggravating factors applied to him rather than to an accomplice." Pet. for Review at 6. The majority states the "issue is not whether Thomas committed the murder as a principal; the issue is whether he personally committed the aggravating factors." Majority at 5. As this is contrary to this court's holding and remand instructions in *Thomas* I, I disagree.

The original trial court found Thomas guilty of murder in the first degree, found that aggravating factors were present, and then sentenced Thomas to death. As noted by the majority, the State's theory during the original trial was that either Thomas shot the victim himself or Thomas was an accomplice to the murder. *Id*. at 2 n.2.

This court in *Thomas* I found error in the "aggravated" determination and the "to convict" instructions given to the jury. Specifically,

> The "to convict" and aggravating factors instructions were erroneous in conjunction with one another because they "allow a defendant to be sentenced to death without a showing that he or she personally caused the victim's death *or* was a major participant in the homicidal acts." . . . .
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> . . . .
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> The shortcoming of [the accomplice liability] *instruction* is that it does not require that the defendant had knowledge he was facilitating *the* crime for which he was charged.

Thomas I, 150 Wn.2d at 842-43 (first emphasis added) (citations omitted) (quoting

State v. Roberts, 142 Wn.2d 471, 506, 508-09, 14 P.3d 713 (2001)).

This court held the combination of the original instructions given to the jury wrongly removes the "requirement that the jury find *any* form of actus reus *at all* on Thomas's part and relieves the State of its burden to prove the aggravating circumstances as they pertain to the defendant." *Id*. at 843. This court explained these instructions permitted the jury to impose a death sentence on Thomas even if it found Thomas had neither premeditated intent to kill nor was a major participant, or that the aggravating factors applied only to his accomplice. *Id*. at 842-43.

Contrary to Thomas' assertion on appeal, a jury is not required to find the defendant personally killed the victim, only that he was a major participant in the events leading up to the victim's death. *Id.* at 842. However, this court remanded because the original jury instruction did not require the jury to "decide whether the aggravating factors have been proved beyond a reasonable doubt." *Id.* at 849. As this court explained, to find that the aggravating factors have been proved beyond a reasonable doubt where the jury instructions "'allow for the possibility that the defendant was convicted solely as an accomplice to premeditated first degree murder,'" a jury must *expressly* find: "'(1) the defendant was a major participant in the acts that caused the death of the victim, *and* (2) the aggravating factors under the statute specifically apply to the defendant.'" *Id.* at 842 (emphasis added) (quoting *Roberts*, 142 Wn.2d at 508-09). On remand, this court gave the

prosecution the option to either seek sentencing on murder in the first degree or submit the question of aggravating factors to a new jury. *Id*. at 850.

The prosecution opted to submit consideration of the aggravating factors to a new jury, which the trial court empaneled.[1] The trial court provided instructions to the new jury, which as the majority asserts, "left no chance, as there was in Thomas' first trial, that the jury could have answered yes if they thought an accomplice, rather that Thomas, committed the aggravating circumstances." Majority at 7. However, in the new trial on aggravating circumstances, the jury was instructed that Thomas had already "been convicted of the crime of murder in the first degree" and was not permitted to consider whether Thomas *personally* had the intent to murder *or* whether Thomas was a major participant.[2] Clerk's Papers (CP)

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[1] At the new trial, the prosecution chose not to seek the death penalty. *See State v. Thomas*, No. 34339-8-II, slip op. at 4, 2007 WL 2379653, at *2 (Wash. Ct. App. Aug. 21, 2007).

[2] Part of the trial court's confusion may be due to this court's statement in *Thomas* I that it agreed Thomas "'was so entrenched as a major participant in the murder that his culpability cannot be lessened even if his accomplice pulled the trigger.'" *Thomas* I, 150 Wn.2d at 846 (quoting Br. of Resp't at 133). This passage is from the court's harmless error analysis regarding its affirmation of Thomas' underlying conviction for first degree premeditated murder. But to find whether aggravating factors have been proved where accomplice liability was charged, a jury must *expressly* find *either* major participation or premeditated intent *and* that the aggravating factors specifically apply to the defendant. *Id*. at 842. So the majority in *Thomas* I concluded that for the purposes of aggravating factors, Thomas' participation must be treated as not settled and sent to a jury because of the requirement that a jury *expressly* find Thomas was a principal or major participant. Thus, whether Thomas was a major participant or a principal, rather than an accomplice, was rendered reminiscent of Schrödinger's cat, the famous thought

at 179 (Jury Instruction 1); *see also* CP at 181 (Jury Instruction 2). Consequently, the same problem this court confronted in *Thomas* I remains.

When the trial court instructed the new jury that Thomas had already been convicted of murder in the first degree, the instructions did not explain to jurors that it was possible the previous jury had convicted Thomas on an accomplice theory.[3] Nonetheless, the majority states the "instructions at Thomas' resentencing proceeding did not require the jury to accept as given that he personally committed

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experiment; it was simultaneously "proved" and "not-proved." *See id*. at 842-45, 849.

This conundrum was created in part by a harmless error analysis that permits the court to insert its own opinions about the evidence and to base its decisions on its own speculations as to the inner workings of the minds of an improperly instructed jury. The confusion is compounded by the situation here, where the court affirmed a conviction but remanded the aggravated sentence, though both are based on the same set of facts. *See State v. Robinson*, 24 Wn.2d 909, 917, 167 P.2d 986 (1946) ("[I]t is impossible for courts to contemplate the probabilities any evidence may have upon the minds of the jurors.").

[3] The trial court informed the jury that Thomas had been convicted of premeditated murder in the first degree in 2 of 22 jury instructions. "The defendant has been found guilty of premeditated murder in the first degree." CP at 181 (Jury Instruction 2); *see also* CP at 179 (Jury Instruction 1). The trial court did not inform the jury that the prior conviction may have been based on an accomplice theory in *any* of the 22 instructions. The majority notes Thomas' counsel argued in closing that Thomas may not have shot the victim. Majority at 8 (referencing 15RP at 1643-44). However, the fact that an argument was presented at closing does not address the issue of whether jurors were properly permitted to consider the specific facts this court remanded for them to expressly find. Here, they were not. The jury instructions and the special verdict form did not allow the jury to entertain the possibility that Thomas may *not* have been a major participant, so defense counsel's argument at closing is irrelevant.

the murder . . . ." Majority at 8. This is flatly contradicted by the plain language of the instructions themselves. The jury was instructed that Thomas was found guilty of premeditated murder in the first degree. CP at 179, 181 (Jury Instructions 1, 2). The jury was then asked the following questions on the special verdict form:

> (1) Did the defendant commit the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime?
>
> . . . .
>
> (2) Did the defendant commit the murder in the course of, in furtherance of, or in immediate flight from robbery in the first degree?
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> . . . .
>
> (3) Did the defendant commit the murder in the course of, in furtherance of, or in immediate flight from robbery in the second degree?
>
> . . . .
>
> (4) Did the defendant commit the murder in the course of, in furtherance of, or in immediate flight from residential burglary?
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> . . . .

CP at 202 (special verdict form).

The questions presented to the jury repeatedly state Thomas committed the murder and only asked jurors if it was done in connection with another crime. Thus, the trial court replicated the original error by limiting its instruction to the statement that Thomas had already been convicted of the murder without giving the jury the option of determining whether he had the requisite intent *or* if he was a

major participant.

As per this court's original remand, Thomas is entitled to have the jury determine the full question of whether the aggravating factors apply to him personally, which requires them to find *both* that Thomas was either the perpetrator or a major participant *and* that Thomas personally committed the aggravating acts. This, after all, is what this court asked the trial court to do in *Thomas* I, when we held the "jury instruction and the aggravating factors special verdict form given in his case did not require the jury to find that Thomas in particular had the intent to murder [the victim] or that the aggravating factors specifically applied to him as opposed to his accomplice. . . . These facts must be found by the jury." *Thomas* I, 150 Wn.2d at 876.

Thus, I dissent from the majority's affirmation of the new jury's finding that the aggravating factors applied to Thomas; I would instead remand to the trial court to empanel a jury to actually determine both questions.

III. It is not "race-neutral" to strike the sole African-American from a jury pool because that juror expressed concerns about the minority representation in the venire

As the majority notes, during voir dire juror 33 stated, "'I mean, I look at this jury pool. Look at that. Is this really a makeup of Tacoma or Pierce County? This is bizarre, man . . . . You have more dark in the bailiff than we have in this jury pool, and that's the way the prosecutors want it.'" Majority at 15 (quoting

Verbatim Report of Proceedings (RP) (Oct. 27, 2005) at 4). The juror made no other comments about the State, and the prosecution asked no questions to have the juror clarify these remarks. *Id*. Juror 33 was the sole African-American in the pool. The prosecution characterized this exchange as being "clearly hostile toward the State." 7RP at 120. The trial court denied Thomas' challenge to the removal of the juror under *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). 7RP at 122. At the hearing on the *Batson* issue, the prosecutor and the trial court made the following statements:

> [Mr. Benton, prosecutor:]
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> Juror No. 33 observed the lack of what he believed was racial cross representation . . . because there was, at least in his view, there weren't very many representatives of his race. It was the comment after that, the rather forceful comment, that was made that "the prosecution would like it that way," and his comments during that—those few moments that he was speaking, clearly was hostile toward the State, a clear indication that the State had somehow brought this particular group of people together with a lack of minority representation . . . . [G]iven the demonstrated hostility that I think the Court had observed and that sort of force with which this was made . . . the State felt that that juror could not give the State a fair trial.

Id. at 120-21.[4]

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[4] As evidenced by the exchange, the prosecutor ironically based his argument to strike the lone African-American juror on the juror's statement regarding minority representation in the jury pool. According to the record of voir dire, this was the entire interaction on this issue:

Excerpt No. 3

> The Court: Well, I heard the statements made by Juror No. 33 . . . .
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> . . . .
>
> The Court: —and I was alerted to his strong conviction or strong thought about the issue of race being an issue in this case, and I say that because he used words like "this is a joke," he referred to this—the system as being a joke because he was the only African American on the venire, I think. And that, to me, indicated that he was very much—he had already made up his mind as to how he felt about

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> Mr. Thornton: But you agree that there's some sort of, when you walk in, human nature that we make a judgment?
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> Juror No. 2: Yes, I do.
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> Mr. Thornton: No. 33?
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> Juror No. 33: I think that's a stupid statement. I mean, Ted Bundy, did he look guilty? Jeffrey Dahmer, next-door neighbor, did he look guilty or act guilty? That's more of a racist statement than anything else. I mean, look at this jury pool. Look at that. Is this really a makeup of Tacoma or Pierce County? This is bizarre, man.
>
> Mr. Thornton: You agree with that statement?
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> Juror No. 33: You have more dark in the bailiff than we have in this jury pool, and that's the way the prosecutors want it.
>
> Mr. Thornton: That is troubling. Doesn't seem like there's a cross-section.
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> (Excerpt No. 3 completed.)

RP (Oct. 27, 2005) at 3-4. There is no indication in the record that the prosecutor asked juror 33 any questions regarding the above exchange or the issue of minority representation in the jury pool in general. Without any inquiry by the State or the trial court, it would be reasonable for juror 33 to conclude that he was initially correct when he said "that's the way the prosecutors want it." *Id*.

> the system and how unfair it is, and I don't think that from what he was saying that he could be fair to one side, for sure towards the State if he feels that bad about it.
>
> I'm reading, "The State's exercise of a single peremptory challenge to remove one black juror is not prima facie evidence of purposeful discrimination as it does not establish a pattern of exclusion. And as such circumstances, the State is not required to give a neutral explanation to the challenge," State v. Ashcraft. The Batson challenge is denied.
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> What's next?

7RP at 121-22 (trial court ruling on *Batson* challenge).[5]

In *Batson* the United States Supreme Court declared, "[t]he Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race." 476 U.S. at 86. *Batson* outlines a three-part process to determine whether a prosecutor has excluded a juror based on race. First, the challenger must "make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Id*. at 93-94. Second, "the burden shifts to the State to come forward with a neutral explanation for challenging" the juror. *Id*. at 97. Third, "[t]he trial court then [has] the duty to determine if the defendant has established purposeful discrimination."[6] *Id*. at 98.

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[5] Contrary to the trial judge's statement, the phrase "this is a joke" does not appear in the record of the exchange with juror 33.

[6] The majority states, "the trial court heard the State's reasons for striking the juror and found them to be race-neutral." Majority at 17. As indicated by the full

Trial courts are not required to find a prima facie case based on the dismissal of the only venire person from a constitutionally cognizable group, but they may, in their discretion, recognize a prima facie case in such instances. *State v. Hicks*, 163 Wn.2d 477, 490, 181 P.3d 831, *cert. denied*, 129 S. Ct. 278 (2008). The *Batson* Court noted that "'a consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause,'" and that "'[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" 476 U.S. at 95 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 266 n.14, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)). The Court further declared that "[f]or evidentiary requirements to dictate that 'several must suffer discrimination' before one could object would be inconsistent with the promise of equal protection to all." *Id*. at 95-96 (quoting *McCray v. New York*, 461 U.S. 961, 965, 103 S. Ct. 2438, 77 L. Ed. 2d 1322 (1983) (Marshall, J., dissenting from denial of certiorari)).

The statement juror 33 made that the prosecution found objectionable was a

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quotation of the trial court's ruling, *supra*, the judge did not find the State's reason to be race-neutral, but rather concluded he did not have to reach the issue of race-neutrality. The majority seems to recognize, "the court was mistaken as to the standard for establishing a prima facie case of discrimination," yet inexplicably asserts the application of that incorrect standard was "a correct application of the law." *Id*.

comment about the racial composition of the jury pool. The trial court believed it did not have to decide if the prosecution's reason for striking the juror was "race-neutral," because no pattern of discrimination could be established. That is the wrong standard, as in fact a single instance can be discriminatory. *See Batson*, 476 U.S. at 95; *Hicks*, 163 Wn.2d at 490. Further, the trial court made that decision despite the fact that the prosecution never asked one follow-up question regarding the juror's opinion. I note that "'[t]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.'" *Miller-El v. Dretke*, 545 U.S. 231, 246, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (quoting *Ex parte Travis*, 776 So. 2d 874, 881 (Ala. 2000)).

African-Americans were historically excluded from serving on juries, and minority underrepresentation on juries has been the subject of considerable political and legal discussion. Apparently, in the majority's view, the lesson for any prospective minority juror in the state of Washington is to be sure not to mention this fact. The majority seems to agree it is "race-neutral" to exclude the sole African-American juror in a venire because that juror mentioned race. This is not only paradoxical but untenable.

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:

Justice Debra L. Stephens